

# Alternative Dispute Resolution in A Feminist Voice

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## I. INTRODUCTION

This Article was born from the conjunction of two seemingly unrelated events: A course in Negotiation for Lawyers<sup>1</sup> and participation in various feminist activities at Cornell Law School.<sup>2</sup> The lessons of the two conflicted at nearly every juncture. Negotiation seemed to me to leave out as many crucial landmarks as the adversary system, while feminism suggested that alternative dispute resolution offered some hope for transforming the legal system. Finally, in the last days of the Negotiation class the two came together and worked. During the final negotiation exercise, three women and one man divided several objects among them. The method of distribution we chose included honestly stating our preferences about the objects and then drawing cards when those preferences conflicted. While watching the videotape of this exercise, the professor was amused by the "objective criteria"<sup>3</sup> we used to facilitate our value-claiming,<sup>4</sup> as opposed to value-creative,<sup>5</sup> bargaining. He noted, however, that we had avoided a common problem of so-called "objective criteria:" such criteria generally favor the position of the person who suggests them.<sup>6</sup> This statement brought feminism and alternative dispute resolution together for me. Recalling Catherine MacKinnon's feelings that

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1. Offered at Cornell Law School, January, 1989. Taught by Professor Dale Oesterle.

2. These activities included organizing a symposium on Feminism and the Law (March 3-4, 1989), joining a student-taught class on Feminism and Law, and studying the works of feminist writers on my own.

3. R. FISHER & W. URY, *GETTING TO YES: NEGOTIATING AGREEMENT WITHOUT GIVING IN* 84-98 (1981), urges negotiators to use "objective criteria," rather than claiming tactics, to resolve conflicts in distributive bargaining situations, *see infra* note 4. These authors intended the term "objective criteria" to include "standards of fairness, efficiency, [and] scientific merit," R. FISHER & W. URY, *id.* at 86, along with professional standards, moral standards, tradition, what a court would decide, etc. *Id.* at 89. They even include "[d]rawing lots, flipping a coin, and other forms of chance. . . ." *Id.* at 90.

Fisher and Ury's "win-win" approach to negotiation will be discussed more fully, *infra* notes 64-85 and accompanying text.

4. *See* D. LAX & J. SEBENIUS, *THE MANAGER AS NEGOTIATOR: BARGAINING FOR COOPERATION AND COMPETITIVE GAIN* 32-33 (1986).

5. *Id.* at 30-32.

6. To use an example from R. FISHER & W. URY, *supra* note 3, at 88, a hard-bargaining insurance claims adjuster will not bring up the objective criterion of "what the [insured and demolished] car could have been sold for," *id.*, unless that figure favors her position.

"objective criteria" are *not* objective<sup>7</sup> (they are male),<sup>8</sup> I realized that the source of much of my discontent with the judicial system was its particularly male approach even to particularly female issues. This approach had been brought into alternative dispute resolution.<sup>9</sup>

This Article will explore the possibilities and problems of alternative dispute resolution methods from a feminist perspective. I will focus on negotiation, mediation, and arbitration, and I will apply the feminist perspectives of Carol Gilligan,<sup>10</sup> Catherine MacKinnon,<sup>11</sup> and others.<sup>12</sup>

Alternative dispute resolution has great potential as part of feminist jurisprudence, but its success is limited by the male perspective that dominates our legal system generally. This limit will only be completely eliminated when our society develops beyond its male-centered perspective. Meanwhile, however, teaching alternative dispute resolution with a serious focus on female voices is, I believe, an important step in the attempt "[t]o remake [legal] society so that women can live [and work] here. . . ."<sup>13</sup>

7. MacKinnon, *Feminism, Marxism, Method, and the State: Toward Feminist Jurisprudence*, 8 SIGNS 635, 635-39 n.6 (1983)[hereinafter *Toward Feminist Jurisprudence*]. "[m]ale dominance is perhaps the most pervasive and tenacious system of power in history, [and] it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularity is the meaning of universality." *Id.* at 638-39. See also C. MACKINNON, *FEMINISM UNMODIFIED: DISCOURSES ON LIFE AND LAW* 54-55, 86-87 (1987) [hereinafter *FEMINISM UNMODIFIED*].

8. What I mean when I use this term will hopefully become clear later, see *infra* notes 175-205 and accompanying text. See generally C. GILLIGAN, *IN A DIFFERENT VOICE: PSYCHOLOGICAL THEORY AND WOMEN'S DEVELOPMENT* (1982) (exploring the differences between "male" and "female" thought processes and moral and psychological development). The term "male" (or "female") does not necessarily include all men (or women). Nor does it exclude all women (or men). Rather, the "male" approach or perspective or voice is the one that is accepted and acted upon by our society and is, I believe, predominant in men, while the female approach/perspective/voice is predominant in women. See MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 636 n.3.

9. By this I do not mean that the class was biased against women. Apparently women did as well (grade-wise) as men in the class and people of both genders learned a great deal. What I do mean is that I fear we all learned that we had better adopt a male perspective and voice if we expect to succeed in the legal profession, even if we never step foot in court. Women, of course, are as good at adopting this voice as men are. I believe we should not *have* to adopt it.

10. See C. GILLIGAN, *supra* note 8.

11. See C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7; C. MACKINNON, *SEXUAL HARASSMENT OF WORKING WOMEN* (1979); MacKinnon, *Reply to Miller, Acker and Barry, Johnson, West, and Gardiner*, 10 SIGNS 184 (1984); MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7; MacKinnon, *Feminism, Marxism, Method, and the State: An Agenda for Theory*, 7 SIGNS 515 (1982)[hereinafter *Agenda*].

12. Janet Rifkin, for example, has taken a feminist perspective on mediation. Rifkin, *Mediation From a Feminist Perspective: Promise and Problems*, 2 LAW AND INEQUALITY 21 (1984). I plan to expand upon her approach.

13. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 16.

## II. ADJUDICATION AND THE NEED FOR ALTERNATIVES

The legal system in the United States has traditionally focused on court adjudication as the central method for resolving disputes. Such adjudication involves a state-chosen third-party decisionmaker who makes a binding choice between the disputing parties. The decisionmaker is neutral and usually not a specialist in the subject of the dispute. The process is highly formal. Arguments are limited by substantive, procedural, and evidentiary rules. These arguments are generally presented by the parties' representatives rather than by the parties themselves. The stance of the parties and their representatives is adversarial and antagonistic. The process generally results in a "win-lose" decision and the remedies available may be limited. The decisions occasionally establish societal norms or legal precedents.<sup>14</sup>

A. *The Need for Alternatives — Generally*

A number of factors have apparently contributed to the recent interest in alternative methods of dispute resolution. First, the recent increase in American society's litigiousness<sup>15</sup> and the availability of lawyers to fulfill this desire to litigate<sup>16</sup> have led to overcrowded court dockets. This overcrowding, in combination with the delay and expense caused by the formality inherent in litigation, has led lawyers to seek more efficient methods for resolving conflicts. Also, the need to increase community involvement in dispute resolution processes and to increase the public's

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14. See S. GOLDBERG, E. GREEN & F. SANDER, DISPUTE RESOLUTION 8 (1985) (a table comparing basic elements of "primary" dispute resolution processes); L. KANOWITZ, CASES AND MATERIALS ON ALTERNATIVE DISPUTE RESOLUTION 9-10 (1985); L. RISKIN & J. WESTBROOK, DISPUTE RESOLUTION AND LAWYERS 2-3 (1987). But see Chayes, *The Role of the Judge in Public Law Litigation*, 89 HARV. L. REV. 1281 (1976). Chayes argues that, while my description of the judicial system has traditionally been true, the judicial system has changed and is changing. In fact, those changes seem to be taking the criticisms posed by the alternative dispute resolution movement into account. I favor these changes, but I do not believe the transformation is completed yet. At the very least, traditional law school courses have not yet taken these changes seriously and, therefore, are still producing lawyers prepared to face the traditional model.

15. See Delgado, Dunn, Brown, Lee & Hubbert, *Fairness and Formality: Minimizing the Risk of Prejudice in Alternative Dispute Resolution*, 1985 WIS. L. REV. 1359, 1361-62. The reality of this litigation explosion seems to be somewhat in doubt. See L. KANOWITZ, *supra* note 14, at 7-8. There is, at any rate, little doubt about the real problems of delay and expense in litigation.

16. See J. MURRAY, A. RAU & E. SHERMAN, PROCESSES OF DISPUTE RESOLUTION: THE ROLE OF LAWYERS 16 (1989).

access to the justice system arguably sparked the search for alternatives.<sup>17</sup>

Other commentators assert that alternative dispute resolution techniques are preferable to adjudication in certain cases where the nature of the dispute requires a broader range of remedies and a broader focus on the issues involved than a court can provide. Alternative dispute resolution is also beneficial where the parties need to continue their relationship after the dispute is resolved and, therefore, cannot afford the antagonism that adversary proceedings often breed. Moreover, where technical expertise, which courts generally do not possess, is necessary for a proper resolution of the dispute, alternative dispute mechanisms offer preferable results.<sup>18</sup> Finally, some argue that the alternative dispute resolution movement is properly fueled by the sense that nonadjudicatory techniques increase the quality of dispute resolution. "Solutions to disputes can be tailored to the parties' polycentric needs and can achieve greater party satisfaction and enforcement reliability because they are not binary, win/lose results."<sup>19</sup> I call this the quality-of-justice argument.

#### B. *The Need for Alternatives — Feminist View*

The feminist perspective<sup>20</sup> shares a great deal with the quality-of-justice argument for alternative dispute resolution. It suggests that the pro-

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17. See S. GOLDBERG, E. GREEN, & F. SANDER, *supra* note 14, at 6-7 (discussing these and other goals and noting that the goal of increased community involvement is unlikely to succeed in today's mobile culture and that the goal of increased access to justice conflicts to some extent with the goal of easing the burden on courts).

18. See L. KANOWITZ, *supra* note 14, at 9.

19. Menkel-Meadow, *For and Against Settlement: Uses and Abuses of the Mandatory Settlement Conference*, 33 UCLA L. REV. 485, 487 (1985)(footnotes omitted)[hereinafter *For and Against Settlement*]. See also Menkel-Meadow, *Toward Another View of Legal Negotiation: The Structure of Problem Solving*, 31 UCLA L. REV. 754 (1984) [hereinafter *Toward Another View*]. Some commentators seem to see the differences between this quality-of-justice approach and the approach outlined *supra* text accompanying note 18, as merely an argument over how frequently the types of cases which are inappropriate for judicial resolution arise. See Fiss, *Against Settlement*, 93 YALE L. J. 1073, 1073-87 (1984). I believe, however, that the quality-of-justice approach, at least as modified by feminism, speaks not only to specific cases inappropriate for judicial resolution, however frequently those cases may arise, but to the adversary system as a whole.

20. This perspective is actually a combination of diverse perspectives.

Feminism aspires to represent the experience of all women as women see it, yet criticizes antifeminism and misogyny, including when it appears in female form. This tension is compressed in the epistemic term of art 'the standpoint of all women.' We are barely beginning to unpack it. Not all women agree with the feminist account of women's situation, nor do all feminists agree with any single rendition of feminism.

MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 637 n.5. Carrie Menkel-Meadow and Janet Rifkin have come closest to applying this perspective to alternative dispute resolution. See Menkel-Meadow, *For and Against Settlement*, *supra* note 19, at

cess has a tremendous effect on the substantive results obtained. It further suggests that the choice of process is important, in its own right, as a means for remaking the legal system to take account of women's perspectives, for making women's voices heard, and for generally improving the relationship between the legal system and the people it is supposed to serve.

The traditional legal system fails under this perspective because, in addition to the failings discussed above, it uses objectivity, adverseness, hierarchy, and abstraction as its primary tools. The traditional legal system is based on these ideals.

1. *Objectivity.* The objective or neutral stance is traditionally understood to be no stance at all. The court ideally takes a position removed from the parties and the issues before it. The court presumably has no feelings about either party. The same is true, ideally, of the substantive, procedural, and evidentiary law, which acts as a filter between the court and the parties. If these ideals work, the result reached in the case is presumably just.

Feminists believe, however, that the objective stance is really the *male* stance.<sup>21</sup> This is so for a number of practical and societal reasons. First, the members of our courts are, and always have been, predominately male. This not only causes a potential problem of bias in favor of male parties, but it also injects a male perspective into the proceedings, which sets a male standard for the parties to meet and which decides questions in a male way.<sup>22</sup> Second, the lawmakers in our legislatures are predominately male. This, again, raises problems of bias and male perspective, standards, and decisionmaking methods in the law that legislatures produce. It is reasonable to expect that this male-centered law, when combined with our male-centered courts will produce male-centered decisions through male-centered processes.<sup>23</sup> In addition, our society and our government have been created and dominated, in terms of power, if not in terms of numbers, by men and have traditionally praised the male perspective as the *only* right/moral/legal/mature perspective. Society has thus made the male-centeredness of the legal system legitimate, necessary, and proper, and has turned the male perspective into the *only*, the

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490; Menkel-Meadow, *Toward Another View*, *supra* note 19, at 763-64 n.28; Rifkin, *supra* note 12.

21. See, e.g., C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 54-55; MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 644-45. For an explanation of what the male stance entails, see *infra* notes 175-91 and 156-60 and accompanying text.

22. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 645.

23. *Id.* at 644-55 (using the law of rape to demonstrate the exclusively male perspective inherent in our legal system).

*objective*, perspective.<sup>24</sup> This societal factor, if left unchanged, would skew the justice of adjudicated decisions even if most judges and legislators were not biologically male, because law-makers and law-apppliers are socialized into a male perspective since childhood.

2. *Adverseness*. The judicial system relies on lawyers to inject adverseness into its proceedings. Lawyers take opposing positions and do battle before the court. Ideally, this battling reveals the truth. The adversarial process is subject to many criticisms. For example, the lawyers tend to take polar positions and the courts tend to choose passively between the sides. This process seems, therefore, likely to miss the truth if it is somewhere between the poles.

The feminist perspective challenges the adversary process because it is a particularly male process. It fails to take women's perspectives into account. According to Carol Gilligan's<sup>25</sup> theory, the ideal of competition between poles fits into the male perspective of weighing abstract rights.<sup>26</sup> It does not fit into the female perspective, which focuses on the relationship between the parties.<sup>27</sup> The adversary process is a serious threat to that relationship, just as aggressive competition is a threat to any positive relationship. The female perspective prefers reconciliation of different positions, rather than choice between them. The female perspective prefers to look beyond the opposing positions of the parties — to look between and behind the positions for the truth.<sup>28</sup> The adversary system, by having lawyers argue opposite positions over narrow legal issues within a rigid evidentiary and procedural structure, prevents just such looking between and beyond. The female perspective prefers interpersonal communication to conflict and competition.<sup>29</sup> The adversary system encourages conflict and competition.

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24. *Id.* at 644-45, 655-57, 658.

25. See generally C. GILLIGAN, *supra* note 8, at 25-63 (describing the male and female perspectives). See also *supra* notes 161-205 and accompanying text.

26. C. GILLIGAN, *supra* note 8, at 32 ("[The male view] abstracts the moral problem from the interpersonal situation, finding in the logic of fairness an objective way to decide who will win the dispute.").

27. *Id.* at 30 ("[The female's] world is a world of relationships and psychological truths where an awareness of the connection between people gives rise to a recognition of responsibility for one another, a perception of the need for response. . . . [She] see[s] the actors in the dilemma arrayed not as opponents in a contest of rights but as members of a network of relationships on whose continuation they all depend.").

28. *Id.* at 31 ("[The] two . . . see two very different moral problems — [the male] a conflict between life and property that can be resolved by logical deduction, [the female] a fracture of human relationship that must be mended with its own thread.").

29. *Id.* at 30-31 ("Consequently her solution to the dilemma lies in activating the network [of relationships] by communication, securing . . . inclusion. . . by strengthening rather than severing connections.").

3. *Hierarchy and Abstraction.* The feminist perspective also challenges the legal system's rigid hierarchies of actors and of rights. Ideally, hierarchy among the legal system's actors ensures that a final decisionmaker will always be available to resolve conflicts. Hierarchy among rights ideally makes decision-making easy, mathematical, and predictable. It also ideally reflects society's preferences and values.

Carol Gilligan's theory suggests, however, that hierarchical rankings are particularly consistent with the male perspective. The female perspective, with its emphasis on relationships, communication, and interaction, accepts hierarchy only as an undesirable last resort.<sup>30</sup> Further, feminism rejects hierarchy as reflecting and enforcing male dominance.<sup>31</sup>

Similarly, the feminist perspective challenges the law's reliance on abstract rights. Ideally, abstraction ensures that the law is unbiased, impersonal, and generally applicable. In the feminist view, however, abstraction is an element of the male voice. The female voice, in contrast, focuses on real context rather than on generalities.<sup>32</sup> The feminist view also rejects abstraction because it blinds the justice system to women's experience, which is generally ignored in society's abstract definitions of reality.<sup>33</sup>

### III. ALTERNATIVE DISPUTE RESOLUTION — BACKGROUND

This Article will focus on negotiation, mediation, and arbitration, although many other alternative dispute resolution techniques exist.<sup>34</sup> This section will describe generally the methods, goals, and uses of these three techniques. It will also explore how well each technique achieves the goals of the alternative dispute resolution movement.

#### A. *Negotiation*

Negotiation is the process of two or more parties working together to resolve a conflict between them by creating a solution to which all can agree. It is the practice of "communication for the purpose of persuasion [and it] is the preeminent mode of dispute resolution."<sup>35</sup> It occurs in

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30. See *infra* text accompanying notes 175-85.

31. See *infra* text accompanying notes 147-55.

32. See *infra* text accompanying notes 175-85.

33. See *infra* text accompanying notes 147-55.

34. For example, community justice centers, rent-a-judge programs, judicial settlement conferences, and small claims court.

35. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 19.

many diverse situations in everyday life. It is also an important aspect of lawyering.<sup>36</sup> The basic preconditions to negotiation are:

1. There is a conflict of interest between two or more parties; that is, what one wants is not necessarily what the other one wants.

2. There is no fixed or established set of rules or procedures for resolving the conflict, or the parties prefer to work outside of a set of rules and procedures to invent their own solution to the conflict.

3. The parties, at least for the moment, prefer to search for agreement rather than openly fight, to have one side capitulate, to permanently break off contact, or to take their dispute to a higher authority to resolve it.<sup>37</sup>

1. *Goals.* The goals of negotiation vary according to the context in which it is used. Basically, it allows the parties to work out their own creative solution to their dispute without intervention from the state. Further, it can avoid the binary, win/lose results of judicial decision. Negotiation increases party involvement in, and thus attachment to, the solution. It can also avoid the antagonism inherent in adversary proceedings. It can avoid the cost and delay of adjudication and lessen the caseloads of courts. Finally, negotiation allows a broader scope of inquiry and range of remedies than does court adjudication.

2. *Methods.* There are two primary approaches to negotiation: the competitive/adversarial/hard approach and the cooperative/problem-solving/soft approach. The competitive approach is the traditional approach to negotiation.<sup>38</sup> The cooperative approach has come to light more recently.<sup>39</sup>

#### a. *The Competitive Approach*

- i. *Structure and process.* The structure of a competitive negotiation is a "stylized linear ritual of struggle."<sup>40</sup> The main elements are:

- "1. making high initial demands;
2. maintaining a high level of demands in the course of negotiation;
3. making few concessions;
4. making small concessions (when concessions are made); and
5. having a generally high level of aspiration."<sup>41</sup>

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36. *Id.*

37. R. LEWICKI & J. LITTERER, NEGOTIATION 4 (1985).

38. See Menkel-Meadow, *Toward Another View*, *supra* note 19, at 764-65.

39. See R. FISHER & W. URY, *supra* note 3; Menkel-Meadow, *Toward Another View*, *supra* note 19.

40. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 767.

41. G. WILLIAMS, LEGAL NEGOTIATION AND SETTLEMENT 48 (1983).

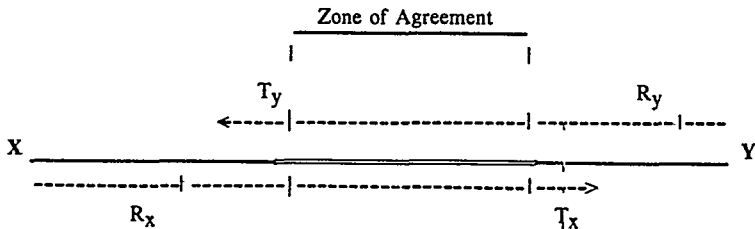


This approach proceeds along a "linear field of pre-established 'commitment and resistance' points"<sup>42</sup> and results in "[a] 'focal point' midway between the first offers of each party."<sup>43</sup> This structure encourages compromise at a midway point. It further encourages competitive strategies, emphasizing "an argumentative, debate form of discussion"<sup>44</sup> "characterized by arguments and statements rather than questions and searches for new information."<sup>45</sup> It encourages negotiators to hide their own desires and to manipulate their opponents' perceptions of the possibilities for agreement. The tactics for accomplishing this include commitments, threats, extreme positions and offers, lying, exaggeration, ridicule, accusation, bluffs, moral language, and power tactics.<sup>46</sup> Competitive negotiators create tension and pressure for their opponents. They are motivated by the desire to win, to outmaneuver their opponents, and to maximize payoff.<sup>47</sup>

ii. Effects. "Experimental studies of bargaining have shown that in many settings, use of toughness increases profits for the tough negotiator."<sup>48</sup> If used effectively, competitive bargaining strategies can manipulate and intimidate the opponent, causing her to lose confidence and to reduce her expectations.<sup>49</sup> However, this approach has serious drawbacks. The tension and distrust created by this approach can distort the communication between the parties and lead to misunderstandings.<sup>50</sup> The

42. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 767.

43. *Id.* Carrie Menkel-Meadow offers the following model of this linear structure:



T = Target Point

R = Resistance Point

*Id.* at 769.

44. *Id.* at 777.

45. *Id.* at 778.

46. *See* D. LAX & J. SEBENIUS, *supra* note 4, at 122-44; G. WILLIAMS, *supra* note 41, at 49.

47. G. WILLIAMS, *supra* note 41, at 49. *See also id.* at 23-25 (describing the characteristics of effective competitive negotiators: tough, dominant, forceful, aggressive, attacking, ambitious, egotist, arrogant, clever, rigid, disinterested in opponent's needs, etc.).

48. *Id.* at 49.

49. *Id.*

50. *Id.* at 50.

high level of emotion this approach creates can increase the likelihood of impasse,<sup>51</sup> and, when impasse occurs, can increase the likelihood of retaliation.<sup>52</sup> Further, the competitive approach can seriously damage the long-term relationship between the parties and the reputation of the negotiator.<sup>53</sup>

This strategy may also negatively affect the outcome of negotiation. The linear structure and the competitive tactics may force the parties into directly opposing postures, which may inhibit their ability to find creative solutions.<sup>54</sup> Further, competitive tactics simply may not work. If the opponent recognizes the tactics or if the competitive negotiator disguises her desires too well, the competitive approach may backfire.<sup>55</sup> Finally, the competitive, adversary approach may exclude the real parties from participation in resolving their dispute. The parties may relinquish control over the process and the outcome to the aggressive negotiator.<sup>56</sup>

The above discussion shows that the competitive approach may actually defeat some of the traditional purposes of the alternative dispute resolution movement. For example, the increased likelihood of impasse may defeat the twin goals of lessening the burden on courts and lowering the cost of dispute resolution.<sup>57</sup> Also, negotiation conducted through this process may be just as ineffective as adjudication at resolving the particular types of disputes deemed inappropriate for judicial resolution.<sup>58</sup> The focus on polar positions and linear progression may limit the scope of inquiry and the range of remedies available. The adversary approach to negotiation damages the relationship between the parties just as adjudication does. Finally, the competitive approach may defeat the quality-of-justice arguments in favor of alternative dispute resolution by leading to win/lose outcomes and by decreasing the parties' participation in, emotional satisfaction with, and attachment to the final agreement.<sup>59</sup>

iii. The Underlying Assumption. The competitive approach to negotiation assumes that negotiation is a "zero-sum game,"<sup>60</sup> that is, that it involves only one issue and that the parties desire the thing at issue equally and exclusively. This is the same assumption that underlies ad-

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51. *Id.* at 50-51.

52. *Id.* at 52.

53. *Id.*

54. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 778.

55. *Id.* at 779-82.

56. *Id.* at 782-83.

57. *See supra* text accompanying notes 15-17.

58. *See supra* text accompanying note 18.

59. *See supra* text accompanying note 19.

60. *See* Menkel-Meadow, *Toward Another View*, *supra* note 19, at 756 n.4 ("A zero-sum game is strictly-speaking, one where the total winnings for one party minus the total losses for the other party equal zero."). *See also id.* at 784.

versarial court proceedings and that has limited the scope of judicial inquiry and remedies. In reality, zero-sum games are quite rare.<sup>61</sup> Factors which limit the zero-sum quality of negotiation include: the involvement of multiple issues (timing, delivery, and manner of payment issues, for example, can transform an apparent zero-sum negotiation into a non-zero-sum game); the parties' different valuations of scarce resources (some parties may value money more than others; parties may assess risk differently); and the fact that resources are not really as scarce as is commonly believed.<sup>62</sup> The competitive approach ignores these factors and thus limits the potential of negotiation.

The competitive approach also assumes the necessity of win/lose results and limited remedies. One party wins on one issue and the other party wins on the next issue. This is particularly true of legal negotiation, because it takes place "in the shadow of the court."<sup>63</sup> Negotiators tend to limit themselves to what a court would do. This also occurs in contract negotiations, where it is particularly unfortunate because the range of possible solutions is so broad that limiting assumptions can lead parties to miss important opportunities. These assumptions make competitive negotiations no real, substantive alternative to adjudication.

#### b. *The Cooperative Approach*

i. Structure and process. The cooperative approach to negotiation is most clearly described in Roger Fisher and William Ury's book, *Getting to Yes*.<sup>64</sup> Fisher and Ury argue that, rather than falling into traditional negotiation patterns, negotiators should "[c]hange the game."<sup>65</sup> The four basic elements of the new game are:

"People: Separate the people from the problem.

Interests: Focus on interests, not positions.

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61. *Id.* at 784-88.

62. A. KOHN, *NO CONTEST: THE CASE AGAINST COMPETITION* 193 (1986) ("Most scarcity is artificial . . . because a prized status has been set up where none existed before") (emphasis added). Alfie Kohn argues that we unnecessarily contrive contests and that, when we encounter what appeals to be real scarcity, we fail to consider the fact that the scarcity may not be "decreed by God. It is the result of a decision that can be changed." *Id.* The assumptions of competitive negotiation, in fact, work to contrive contests and to disguise the alterability of "real" scarcity.

63. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 789.

64. *Supra* note 3. Fisher and Ury distinguish their approach from "soft" negotiation which they believe is based on the same assumptions and structure as the competitive approach, but which takes a conciliatory, conflict-avoiding stance. *Id.* at xii. See also Menkel-Meadow, *Toward Another View*, *supra* note 19.

65. R. FISHER & W. URY, *supra* note 3, at 10.

Options: Generate a variety of possibilities before deciding what to do.

Criteria: Insist that the result be based on some objective standard."<sup>66</sup>

The cooperative approach thus begins, not with polar opposition, but with an attitude of cooperation toward reaching a common goal.<sup>67</sup> This approach requires negotiators to pay attention to the relationship between the parties and between the negotiators; to treat each other as people rather than as obstacles.<sup>68</sup> Negotiators separate the "people problems"<sup>69</sup> from the substantive dispute and resolve the people problems directly, by focusing on each other's perceptions and emotions, and on effective communication.<sup>70</sup> This approach focuses on understanding and working out these people problems, rather than on manipulating them and using them to your own advantage.

The second element of cooperative bargaining, focusing on interests rather than positions, involves understanding the *real* needs of the parties.<sup>71</sup> Cooperative negotiators must not assume that both parties exclusively desire exactly the same thing. Rather, they must find out what lies behind the dispute and exactly what the parties do desire.<sup>72</sup> Then they must base the negotiation discourse on these interests. This element of the cooperative approach removes negotiation from the rigid linear structure that competitive bargaining assumes and imposes.<sup>73</sup> It thus broadens the scope of inquiry and the range of available solutions.

The third element, generating a variety of possible solutions, allows negotiators to explore the possibility that resources are not as scarce as they seem. This element lets negotiators transform seemingly zero-sum games into non-zero-sum problems.<sup>74</sup> It allows them to use multiple issues, differing assessments of value and risk, and the alterability of resource scarcity<sup>75</sup> to expand the pie to be shared among the parties.<sup>76</sup> This allows for solutions which make all parties better off.

The fourth element of Fisher and Ury's approach, using objective criteria, involves basing decisions and results expressly on standards external to the parties, such as justice, fairness, the law, or random chance. Using these criteria helps to avoid the manipulative pressure tactics of

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66. *Id.* at 11.

67. *Id.*

68. *Id.* at 19-20.

69. *Id.* at 22.

70. *Id.* at 22-40.

71. *Id.* at 41-57.

72. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 801-04.

73. *See supra* text accompanying notes 42-43.

74. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 809.

75. *See supra* text accompanying note 62.

76. R. FISHER & W. URY, *supra* note 3, at 58-83.

competitive negotiation<sup>77</sup> and helps to ensure the objective fairness of the final agreement.<sup>78</sup> The criteria thus work not only to reach a better substantive result, but also to improve the process of bargaining. The process, because of its psychological effects, may be just as important to the long-term success of the bargain as the substantive result obtained.

The cooperative approach operates very differently in practice than the competitive approach does. The progression of offers and counteroffers is less linear because it takes diverse interests, rather than just polar positions, into account. The solutions available for discussion are less limited and traditional. Both parties may "win" (defined as doing better than you would have if no agreement had been reached or if the other party had taken all the value involved, rather than as doing better than your opponent) on any given issue. Cooperative negotiation also involves more information-sharing and more real communication. It proceeds through principled justification and active listening, rather than through argumentation, bullying, bluffing, and power tactics. Cooperative negotiators demonstrate trust and good faith by making unilateral concessions which encourage reciprocation.<sup>79</sup> They view negotiation as problem-solving, rather than as gamesmanship.<sup>80</sup>

ii. Effects. Evidence suggests that cooperative negotiation is highly effective at maximizing joint gains.<sup>81</sup> The cooperative approach also results in fewer impasses, and, when impasse does occur, decreases the likelihood of retaliation.<sup>82</sup> It seems to impose less risk on the continuing relationships between the parties and between the negotiators. It also encourages the active participation of the parties, because it prevents negotiators from assuming they know the parties' interests. The parties, therefore, must participate in uncovering real interests and in evaluating proposals.<sup>83</sup> Cooperative negotiation broadens the scope of inquiry and the range of remedies, thus avoiding win/lose results.

The cooperative approach, however, has some serious limitations. The most serious limitation is its vulnerability to exploitation by competitive

77. *Id.* at 84-85.

78. *Id.* at 86-88.

79. G. WILLIAMS, *supra* note 41, at 53.

80. *Id.* According to Williams, cooperative bargainers care more about ethical conduct, fairness, and personal relationships than do competitive bargainers. *Id.* at 20. Effective cooperative negotiators are described as: forthright, trustful, objective, fair-minded, reasonable, logical (not emotional), courteous, personable, friendly, tactful, sincere, organizing, wise, careful, etc. *Id.* at 21-22.

81. This evidence comes largely from game theory. See, e.g. D. LAX & J. SEBENIUS, *supra* note 4, at 158-60 (describing Robert Axelrod's studies of the Prisoner's Dilemma game).

82. G. WILLIAMS, *supra* note 41, at 53.

83. Menkel-Meadow, *Toward Another View*, *supra* note 19, at 829.

negotiators.<sup>84</sup> Competitive negotiators may be unwilling to cooperate and may see cooperative behavior as a sign of weakness that can be used to their own advantage. When this happens, if the cooperative negotiator fails to adjust, she may become the "loser" in a win/lose battle. Competitive negotiation seems to overwhelm cooperative negotiation. This problem is heightened by the fact that competitive strategies are the traditionally accepted means of negotiation and by the fact that legal negotiation is carried out under the shadow of the competitive courts and the competitive law.

The cooperative approach seems more consistent with the traditional goals of the alternative dispute resolution movement.<sup>85</sup> The decreased likelihood of impasse furthers the goal of lessening the burden on courts and avoiding the cost and delay of adjudication. The cooperative approach encourages active party involvement, broadens the range of available remedies, widens the scope of admissible information, and avoids the antagonism, inherent in court proceedings, which tends to threaten the ongoing relationship between the parties. Finally, the cooperative approach improves the quality of justice by avoiding limited win/lose results. The cooperative approach thus offers a real alternative to adjudication.

## B. Mediation

Mediation is a method of "third-party dispute resolution."<sup>86</sup> Mediation is negotiation with the aid of a disinterested third party.<sup>87</sup> "The mediator, in contrast to the judge or arbitrator, has no power to impose an outcome on disputing parties. Rather, the mediator's function is that of assisting the parties to reach their own agreement."<sup>88</sup>

1. *Goals.* "[T]he central quality of mediation [is] its capacity to reorient the parties toward each other, not by imposing rules on them, but by helping them to achieve a new and shared perception of their relationship, a perception that will redirect their attitudes and dispositions toward one another."<sup>89</sup> Lon Fuller traced the proper applications of mediation in 1971,<sup>90</sup> and found that mediation works in many diverse

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84. G. WILLIAMS, *supra* note 41, at 53-54.

85. See *supra* text accompanying notes 15-19.

86. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 91.

87. Fisher & Ury, *Principled Negotiation*, in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 93-94.

88. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 91.

89. Fuller, *Mediation—Its Forms and Functions*, 44 S. CAL. L. REV. 305, 325 (1971).

90. *Id.* at 309-25.

situations: "to make the parties aware of the 'social norms' applicable to their relationship and to persuade them to accommodate themselves to the 'structure' imposed by these norms;"<sup>91</sup> to create social norms;<sup>92</sup> to bring about "a more harmonious relationship between the parties, whether this be achieved through explicit agreement, through a reciprocal acceptance of the 'social norms' relevant to their relationship, or simply because the parties have been helped to a new and more perceptive understanding of one another's problems;"<sup>93</sup> or to terminate a relationship.<sup>94</sup> Thus, "mediation may be directed toward, and result in discrepant and even diametrically opposed results."<sup>95</sup> Fuller concludes, however, that mediation should not be used if the parties' relationship is governed by impersonal, act-oriented rules: for example, the relationship between the state and its citizens. Fuller thus argues that mediation should not be used as a method of law enforcement.<sup>96</sup> Mediation is used in a variety of contexts: labor disputes, family disputes (and disputes between other parties in ongoing relationships), environmental disputes, community disputes, and interpersonal and minor criminal cases which would otherwise end in court.<sup>97</sup>

## 2. *The Method.*

a. *Process.* The mediator's main purpose is to ensure that the negotiators maintain a cooperative approach to the negotiation. The mediator can establish the atmosphere necessary for cooperative negotiation to take place by, for example, "maintaining rules of civilized debate, acting as a neutral discussion leader, helping to set the agenda, suggesting processes for negotiations, . . . [encouraging] reticent people . . . to speak,"<sup>98</sup> and choosing neutral meeting places. The mediator can thus discourage the manipulative strategies of competitive negotiation and open up the lines of communication. The mediator can, further, "provide bargainers with a face-saving means of holding the channels of communication open while they wait for a better external environment."<sup>99</sup> The

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91. *Id.* at 307-08.

92. *Id.* at 308.

93. *Id.*

94. *Id.*

95. *Id.* at 308-09.

96. *Id.* at 327-38.

97. S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 92.

98. H. RAIFFA, *THE ART AND SCIENCE OF NEGOTIATION* 108 (1982). *See also* Fuller, *supra* note 89, at 309.

99. H. RAIFFA, *supra* note 98, at 109.

mediator can ensure that the negotiators separate the people problems from the substantive dispute by acting as a neutral filter between the negotiators. In that position she can separate emotion from information and enhance communication.<sup>100</sup> She may also, as a neutral party, seem trustworthy to the negotiators. Thus, she may easily discover the real interests of the parties and ensure that those interests are used as the basis for bargaining.<sup>101</sup> Because she can see the whole problem, both sides and all the issues involved, she can more easily create a variety of workable solutions to the dispute.<sup>102</sup> Finally, as a neutral participant, objective criteria that she suggests will seem less suspect than they would if either party suggested them.<sup>103</sup>

The mediator thus has a great deal of power to influence the process of negotiation. She can, in fact, turn what seems like a completely distributive bargaining situation into an opportunity to create joint gains.<sup>104</sup> There is some debate, however, over how much responsibility the mediator should bear over the substance of the final result of bargaining.<sup>105</sup> This debate centers on whether the mediator's responsibility is satisfied if the parties reach an agreement they all find acceptable or whether the mediator must further ensure that the agreement is fair to all the parties, to third parties, and to the community.<sup>106</sup> If the mediator's function includes ensuring substantive fairness, the mediator, throughout the mediation process, will have to watch for inequalities of bargaining power and prevent them from being used to a party's disadvantage. This function would require the mediator to take an interest in the outcome and occasionally to take sides during the bargaining process to equalize bargaining power.<sup>107</sup>

b. *Effects.* The neutral third-party mediator facilitates cooperative bargaining without taking the ultimate power to reach a solution away from

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100. Fisher & Ury, *Principled Negotiation*, *supra* note 87, at 93. This is the "separate the people from the problem" element of cooperative negotiation discussed *supra* text accompanying notes 66-70.

101. Fisher & Ury, *Principled Negotiation*, *supra* note 87, at 93. This is the "focus on interests, not positions" element of cooperative negotiation discussed *supra* text accompanying notes 66, 71-73.

102. Fisher & Ury, *Principled Negotiation*, *supra* note 87, at 94. This is the "generate a variety of possibilities before deciding what to do" element of cooperative negotiation discussed *supra* text accompanying notes 66, 74-76.

103. Fisher & Ury, *Principled Negotiation*, *supra* note 87, at 93-94. This is the "insist that the result be based on some objective standard" element of cooperative negotiation discussed *supra* text accompanying notes 66, 77-78.

104. H. RAFFIA, *supra* note 98, at 219.

105. See *The Life of the Mediator: To Be or Not To Be (Accountable)*, in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 108-13.

106. *Id.*

107. *Id.*



the real parties. Thus, like the cooperative approach to negotiation, mediation successfully serves many purposes of the alternative dispute resolution movement.<sup>108</sup> However, as I shall discuss below, if ensuring substantive fairness is not, at least to some extent, a part of the mediator's function, mediation is not as complete an alternative to adjudication as it could be.

While I believe mediation has a great deal to offer feminist theory and practice, it does have some practical drawbacks. In many disputes, particularly disputes between family members, mediation may be unfair to women because of their weaker bargaining position.

[I]t fails to provide full protection for individual family members because, in encouraging agreement between the parties, it may force the weaker party to accept a resolution that gives her far less than she would be entitled to in a formal adjudication. Women who try to deal with battering husbands through [an informal] system may well find themselves the victims of continued battering. Thus, although the aim of deformalization is altruism and family solidarity, the actual result is too often the perpetuation of hierarchy and domination.<sup>109</sup>

Mediation thus fails to help women who are involved in situations of inequality of power because mediation does not prevent such inequality outside the mediation session from affecting the proceedings and results in the mediation session. The function of ensuring substantive fairness, which I argue that mediators should accept, would do much to keep inequalities of power from adversely affecting the results of mediation.

c. *Arbitration.* Arbitration is practiced primarily as a private form of adjudication.<sup>110</sup> It has been used as an alternative to judicial adjudication for hundreds of years.<sup>111</sup> It allows the disputing parties to decide the identity of the arbitrator, the standards by which the arbitrator should make her decision, and the procedures to be used.<sup>112</sup> Yet once the dispute is brought before the arbitrator, the arbitrator takes control and makes a final binding decision.

1. *Goals.* The main benefits of arbitration over judicial adjudication include the possibility of choosing an arbitrator with expertise in the subject matter of the dispute, the privacy of the proceedings, the simplicity and informality of the procedures, the lower cost, and the relative speed.<sup>113</sup>

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108. See *supra* text accompanying notes 81-85.

109. Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497, 1542 (1983).

110. See S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 189-91.

111. *Id.* at 189.

112. *Id.*

113. *Id.* at 189-90.

## 2. *Methods.*

a. *Processes.* There are two possible methods of arbitration: the adjudicatory approach and the mediatory approach.<sup>114</sup> The adjudicatory approach is the one that is most commonly used today.<sup>115</sup> Under this approach, the arbitrator serves as "an umpire who should [be concerned] solely with deciding the grievance. In reaching a decision, the umpire should not consider which result would benefit the relationship of the parties."<sup>116</sup> Rather, the arbitrator should act like a court, objectively applying pre-established procedures and rules. This approach mirrors judicial adjudication on a lesser scale. It reaches similar win/lose results through similar adversary processes.

The mediatory approach views the primary function of the arbitrator as furthering the relationship of the parties.<sup>117</sup> The mediator should attempt to help the parties resolve their dispute through mediation. Only if mediation fails should the arbitrator issue a decision. Further, in reaching a decision, the arbitrator should be "guided primarily by a desire to further the parties' relationship."<sup>118</sup>

b. *Effects.* The adjudicatory approach fails to serve many of the goals of the alternative dispute resolution movement. It does not meet the quality-of-justice arguments for alternative dispute resolution because it focuses on win/lose results. It may also fail to avoid the cost and delay of litigation. The possibility of winning the grievance "breeds an interest in 'winning,' which, in substantial part, is responsible for the delay, high cost, and formality that have come to characterize much of arbitration. . . ."<sup>119</sup> This emphasis on winning makes the selection of the arbitrator seem crucial to the parties. This causes them to spend a substantial amount of time choosing the arbitrator.<sup>120</sup> This also makes the parties more willing to pay a high price for the chosen arbitrator.<sup>121</sup> It also makes them more likely to hire an attorney and to insist on formal transcripts and briefs, thus adding even greater cost and delay.<sup>122</sup>

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114. Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 201, 202.

115. *Id.* at 202.

116. *Id.*

117. *Id.*

118. *Id.*

119. *Id.* at 203.

120. *Id.* at 203-04.

121. *Id.* at 204.

122. *Id.*

The effects of the mediatory approach, because it is less commonly used, are less clear. It seems likely to expand the possibilities for non-binary results and to decrease cost and delay. In fact, if practiced properly, it may provide all the benefits of mediation while further reducing the likelihood of impasse because of the arbitrator's decisionmaking power. Lon Fuller,<sup>123</sup> however, criticizes this approach because he claims that the two methods (mediation and arbitration) are irreconcilable. He argues:

The morality of mediation lies in optimum settlement, a settlement in which each party gives up what he values less, in return for what he values more. The morality of arbitration lies in decision according to the law of contract. The procedures appropriate for mediation are those most likely to uncover that pattern of adjustment which will most nearly meet the interests of both parties. The procedures appropriate for arbitration are those which most securely guarantee each of the parties a meaningful chance to present arguments and proofs for a decision in his favor. Thus, private consultations with the parties, generally wholly improper on the part of an arbitrator, are an indispensable tool of mediation.

Not only are the appropriate procedures different in the two cases, but the facts sought by those procedures are different. There is no way to define "the essential facts" of a situation except by reference to some objective. Since the objective of reaching an optimum settlement is different from that of rendering an award according to the contract, the facts relevant in the two cases are different, or, when they seem the same, are viewed in different aspects. If a person who has mediated unsuccessfully attempts to assume the role of arbitrator, he must endeavor to view the facts of the case in a completely new light, as if he had previously known nothing about them. This is a difficult thing to do.<sup>124</sup>

Fuller begins with a definition of how arbitration *is* practiced and bases his argument on how mediation differs from that method of arbitration. I want to know why arbitration *should* be practiced that way. I want to know why arbitral decisions *should* be based on less than full information. I want to know why arbitral results *should not* contain an element of optimality. Because I believe Fuller's definition turns arbitration into a cheaper version of the court system, I would change the definition. But, even assuming that Fuller's definition is inevitable or unchangeable, I believe his argument can be answered by changing the two-step med-arb approach into a two-person approach. A mediator mediates and then, if that fails, an arbitrator steps in and arbitrates (or the arbitrator and mediator arbitrate together or the mediator recommends a

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123. Fuller, *Collective Bargaining and the Arbitrator*, Proceedings, Fifteenth Annual Meeting, National Academy of Arbitrators 8 (1962), reprinted in S. GOLDBERG, E. GREEN & F. SANDER, *supra* note 14, at 247.

124. *Id.* at 248.

decision to the arbitrator).<sup>125</sup> This minor change gives parties the benefits of both procedures while avoiding the overlap that Fuller finds objectionable.

#### IV. FEMINIST JURISPRUDENCE

This section will describe some principles of feminist theory. It will concentrate mostly on Catherine MacKinnon's dominance theory of gender hierarchy<sup>126</sup> and on Carol Gilligan's psychological theory of women's development.<sup>127</sup> It will focus on the feminist attempt to make our society take women's experience into account, and the ways our society and our legal system obstruct this attempt.

##### A. Objectivity as the Male Perspective

Catherine MacKinnon has attempted to create a feminist theory of the state and the law.<sup>128</sup> One central principle of her theory is the idea that the objective perspective is really a male perspective.<sup>129</sup> MacKinnon's theory is based on the fact that males have historically created and controlled our society.<sup>130</sup> This controlling position has given males the power to define "reality" according to men's subjective experience and to impose that definition of "reality" on the world.<sup>131</sup> Men have used this

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125. See Goldberg, *The Mediation of Grievances Under a Collective Bargaining Contract: An Alternative to Arbitration*, 77 NW. U. L. REV. 270 (1982).

126. C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7; MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7; MacKinnon, *Agenda*, *supra* note 11.

127. C. GILLIGAN, *supra* note 8.

128. See MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7; C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7. I use only parts of MacKinnon's complete feminist theory of society.

129. For discussions of what the male perspective entails, see *infra* notes 156-60 and 175-91 and accompanying text.

130. MacKinnon describes her view of how men came to have control in FEMINISM UNMODIFIED, *supra* note 7, at 40.

131. I enclose the word "reality" in quotation marks here because I am trying to indicate that our society's views of "reality" is not universal or natural or objective or true. It is socially created and defined. True reality (no quotation marks) depends on perspective. It is subjective experience. Thus, there are such things as male reality and female reality (and black reality, and individual, personal reality), and they are not the same, but they are all equally real, legitimate, or true. This is difficult to explain, because I am trying to redefine, or at least un-define, already-defined words so that there will be room in them for women's experience. I fear it will not get any easier as women go on to try to explain what our experience is in male terms. This difficulty does illustrate the exclusiveness of our language; it very successfully thwarts attempts to open it up and make it include new experience. Creating more flexible language may be a crucial task for feminism, because "[w]omen have been deprived . . . of terms of our own in which to express our lives. . . ." C. MAC-

power to make their subjective experience the *only* recognized "reality."<sup>132</sup> Women's subjective experience, as women live it and describe it, has been left out and classified as "unreal." Rather than recognizing women's subjective experience as equally real and valid, men have redefined women to fit male "reality," marking as "unreal" anything which does not fit neatly into male "reality." The male perspective has thus become the standard against which women and the world are measured; that is, the male subjective perspective has become the "objective," the only, standard, while the female subjective perspective has been discounted because of its subjectivity. Male society has thus taken male subjective experience and defined it as "real," abstract, universal, and objective (i.e., as truth). Further, it has taken women's subjective experience and (when it has not ignored women's experience completely) defined it as "unreal," specific, exceptional, and subjective (i.e., as untruth).<sup>133</sup> Then male society forced women to live within those definitions.<sup>134</sup> Thus, as MacKinnon states:

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KINNON, FEMINISM UNMODIFIED, *supra* note 7, at 15. See also Scales, *The Emergence of Feminist Jurisprudence: An Essay*, 95 YALE L.J. 1373, 1388 (1986) ("Feminist method stresses that the mechanisms of law—language, rules, and categories—are all merely means for economy in thought and communication. They make it possible for us to implement justice without reinventing every wheel at every turn. But we must not let means turn into ends. When those mechanisms obscure our vision of the ends of law, they must be revised or ignored. Sometimes we must take the long route in order to get where we really need to be.").

132. See Scales, *supra* note 131, at 1383 ("Paradigmatic male values, like objectivity, are defined as exclusive, identified by their presumed opposites. Those values cannot be content with multiplicity; they create the other and then devour it. Objectivity ignores context; reason is the opposite of emotion; rights preclude care.").

133. *Id.* at 1377 ("[A]bstract universality . . . made maleness the norm of what is human, and did so *sub rosa*, all in the name of neutrality.").

134. In MacKinnon's words:

"[T]he male point of view has forced itself upon the world, and does force itself upon the world, as its way of knowing." C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7, at 50.

"Women say: 'We want to be taken on our own terms.' Male-supremacist logic transforms that to: 'You want to be treated as a woman,' and men define what a woman is." 1984 James McCormick Mitchell Lecture, *Feminist Discourse, Moral Values, and the Law — A Conversation*, 34 BUFFALO L. REV. 11, at 24 (1985) (Catherine MacKinnon speaking).

"[M]en are as different from women as women are from men, but socially the sexes are not equally powerful." C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7, at 42.

"[T]he white man's standard for equality is: are you equal to him? That is hardly a neutral standard. It is a racist, sexist standard." *Id.* at 65.

We notice in language as well as in life that the male occupies both the neutral and the male position. This is another way of saying that the neutrality of objectivity and of maleness are coextensive linguistically, whereas women occupy the marked, the gendered, the different, the forever-female position.

C. MACKINNON, FEMINISM UNMODIFIED, *supra* note 7, at 55.

[M]ale dominance is perhaps the most pervasive and tenacious system of power in history [and] it is metaphysically nearly perfect. Its point of view is the standard for point-of-viewlessness, its particularly the meaning of universality. Its force is exercised as consent, its authority as participation, its supremacy as the paradigm of order, its control as the definition of legitimacy.<sup>135</sup>

MacKinnon gives several examples of contexts in which women's experience is treated as irrelevant. Rape law is one major example. "The crime of rape . . . is [legally] defined around penetration."<sup>136</sup> Yet penetration is not the harm of rape from the woman's point of view. For women, penetration is a central element of intercourse, not just of rape. Rape is a violation of the woman's self, her personhood, and her soul, not just her body. A rapist takes away the woman's control over her body and her life and overrides her will, thus attacking her personhood. Another element of the legal definition of rape is force. Yet, "[t]he level of force is not adjudicated at [the woman's] point of violation; it is adjudicated at the standard of the normal level of force."<sup>137</sup> "A rape victim has

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"Think about it like those anatomy models in medical school. A male body is the human body; all those those extra things women have are studied in ob/gyn." *Id.* at 34.

[W]omen as such . . . [have not], under any doctrinal guise, defined the terms of discourse or the standards of judgement from women's standpoint. Women athletes or academics or military women may be allowed to play with the boys, but we are not allowed to criticize competition or strength or profitably as the standard for athletes, to question objectivity as a measure of intellectual excellence or abstraction as the point of scholarship, nor are we allowed to reject combat as a peculiarly ejaculatory means of conflict resolution.

*Id.* at 74.

The perspective from the male standpoint enforces woman's definition, encircles her body, circumlocutes her speech, and describes her life. The male perspective is systemic and hegemonic. The content of the signification "woman" is the content of women's lives. Each sex has its role, but their stakes and power are not equal. If the sexes are unequal, and perspective participates in situation, there is no ungendered reality or no ungendered perspective. And they are connected. In this context, objectivity—the nonsituated, universal standpoint, whether claimed or aspired to—is a denial of the existence or potency of sex inequality that tacitly participates in constructing reality from the dominant point of view. Objectivity, as the epistemological stance of which objectification is the social process, creates the reality it apprehends by defining as knowledge the reality it creates through its way of apprehending it.

MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 636.

Because [the male standpoint] is the dominant point of view and defines rationality, women are pushed to see reality in its terms, although this denies their vantage point as women in that it contradicts (at least some of) their lived experience. Women who adopt the male standpoint are passing, epistemologically speaking. This is not uncommon and it is rewarded.

*Id.* at 636 n.3.

135. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 638-39.

136. C. MacKinnon, *FEMINISM UNMODIFIED*, *supra* note 7, at 87.

137. *Id.* at 88.

to prove that it was not intercourse. She has to show that there was force and she resisted, because if there was sex, consent is inferred. Finders of fact look for 'more force than usual during the preliminaries.'"<sup>138</sup> Women feel violated when they unwillingly submit to intercourse, even if the method used to coerce them to submit was somewhat lower than "normal" physical force.

Willing consent, not physical force, marks the line between intercourse and rape for women. And consent is coerced at a point far below deadly physical force. Consent is a matter of desire and free will. Consent is thus, to some extent, a subjective standard. The law will not accept women's subjective experience as a standard because that would require believing what women as women say. The law prefers to take the woman's style of dress, her sexual history, her familiarity with her attacker (husbands, boyfriends, dates, and even acquaintances are more difficult to convict than complete strangers), and the race of her attacker (men of color are easier to convict than white rapists) as evidence of consent.

Sexual harassment is another example.

The way the analysis of sexual harassment is sometimes expressed now . . . is that it is an abuse of power, not sexuality. . . . Power is employer/employee . . . because this is a recognized hierarchy. Among men. Power is teacher/student, because courts recognize a hierarchy there. Power is on one side and sexuality on the other. Sexuality is ordinary affection, everyday flirtation. Only when ordinary, everyday affection and flirtation. . . come into the context of *another* hierarchy is it considered potentially an abuse of power. What is not considered to be a hierarchy is women and men—men on top and women on the bottom. That is not considered to be a question of power or social hierarchy, legally or politically.<sup>139</sup>

This analysis makes it "difficult to see [situations of coequal power—among coworkers or students or teachers] as examples of sexual harassment."<sup>140</sup> Yet for women, sexual relations are matters of power—men's political, financial, physical, and social power over women. Thus, sexual harassment by a coworker or fellow student or fellow teacher is, for a woman, still sexual harassment.

The argument over abortion is another example. According to MacKinnon, liberals support abortion as the equivalent of the no-duty-to-rescue rule in tort doctrine, "as if the woman just happened on the fetus."<sup>141</sup> The political right urges abstinence. And opponents of state

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138. *Id.*

139. *Id.* at 89.

140. *Id.*

141. *Id.* at 94.

funding of abortions "make *exceptions* for those special occasions during which they presume women did *not* control sex."<sup>142</sup> They all base their arguments on the assumption that women generally do control sex. MacKinnon argues that this assumption is incorrect. Rather, "women feel compelled to preserve the appearance—which, acted upon, becomes the reality—of male direction of sexual expression."<sup>143</sup> Women feel they cannot interrupt intercourse for birth control or for lack of desire. Sexual intercourse and its consequences are not voluntary for women. Thus, arguments for and against abortion based on the voluntariness of intercourse and pregnancy fail to take women's experience into account.

The point of this societal analysis for feminist legal theory is that the objective stance to which the law and the courts aspire is a male stance. It is created and controlled primarily by men. It is defined exclusively according to male subjective experience. Yet it is treated as abstract, universal, and point-of-viewless.<sup>144</sup> It fails to take women's subjective, yet shared, experience into account. "[T]he attempt to be objective and neutral avoids owning up to the fact that women [and men] do have . . . specific point[s] of view . . . ."<sup>145</sup>

Why is objectivity as a stance specifically male? First of all, familiar to all of you is the social specificity, the particularity, the social situatedness of thought. Social situation is expressed through the concepts people construct to make sense of their situation. [Gender is] one such social situation. . . . [Therefore,] theories constructed by those with the social experience of men, most particularly by those who are not conscious that gender is a specific social circumstance, will be, at the least, open to being male theories. It would be difficult, it would take a lot of conscious effort, for them not to be . . . .

Objectivity is a stance only a subject can take. . . . It is only a subject who gets to take the objective standpoint, the stance which is transparent to its object, the stance that is no stance. A subject is a self. An object is other to that self. . . . [I]t is men socially who are subjects, women socially who are other, objects. Thus the one who has the social access to being that self which takes the stance that is allowed to be objective, that objective person who is subject, is socially male.<sup>146</sup>

The state uses law to institutionalize male perspective and male power.<sup>147</sup> By applying objective male standards and procedures "[t]he

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142. *Id.*

143. *Id.* at 95.

144. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 638-39.

145. C. MacKinnon, *FEMINISM UNMODIFIED*, *supra* note 7, at 86.

146. *Id.* at 54-55.

147. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 645.



law sees and treats women the way men see and treat women."<sup>148</sup> The law and the legal system's objective stance forces women to meet male standards, either the male standard of "male" or the male standard of "female."<sup>149</sup> Women's subjective experience has no place in these male standards. Thus, these objective standards are not real for women and women's subjective experience is not "real" according to these objective standards. Substantively, then, the law institutionalizes the male perspective.

Further, because objectivity reflects the male view of current, male-dominated society, the law legitimizes the way things are.<sup>150</sup> "[Objectivity] ensures that the law will . . . reinforce existing distributions of power. . . ."<sup>151</sup> As long as legal rationality is measured by objectivity, "what counts as reason will be that which corresponds to the way things are. Practical will mean that which can be done without changing anything."<sup>152</sup> Real social change is difficult under such an objective system. The law thus institutionalizes male power in society.

Finally, the objectivity of law insulates male power in the legal system because "[s]uch law not only reflects a society in which men rule women; it [also] rules in a male way. . . ."<sup>153</sup> Abstract, universal objectivity requires law to be impersonal, to use general rules. General, objective rules do not allow consideration of subjective experience. Because women's experience is defined as subjective, and therefore banned from participation in objective rules, women cannot participate *as women* in the legal system, either as parties or as lawyers.<sup>154</sup> In order to participate, women must frame their legal arguments according to men's experience. This clearly reinforces male power in the legal system both by immunizing

148. *Id.* at 644.

149. *Id.* For a discussion of what the male standards of "male" and "female" entail, see C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 70-77.

150. MacKinnon, *Toward Feminist Jurisprudence*, *supra* note 7, at 644-45.

151. *Id.* at 645.

152. *Id.*

153. *Id.*

154. Law is supposed to be rational, objective, abstract and principled, like men; it is not supposed to be irrational, subjective, contextualized or personalized like women. The social, political and intellectual practices that constitute "law" were for many years carried out almost exclusively by men. Given that women were long excluded from the practice of law, it should not be surprising that the traits associated with women are not greatly valued by law. Moreover, in a kind of vicious cycle, the "maleness" of law was used as a justification for excluding women from practicing law. While the number of women in law has been rapidly increasing, the field continues to be heavily male dominated.

F. OLSEN, *THE SEX OF LAW* (as quoted in Menkel-Meadow, *Portia in a Different Voice: Speculations on a Women's Lawyering Process*, 1 BERKELEY WOMEN'S L.J. 39, at 44 (1985)).

substantive laws from the challenge of women's perspective and by immunizing legal practice from the participation of women as women.<sup>155</sup>

Now, what is the male subjective perspective, the perspective that is defined as "reality?" Largely, it flows from the experience that men share — the experience of being on top, in control, superior, and "true." Similarly, the female subjective perspective flows from the experience of being on the bottom, controlled, inferior, and "untrue."<sup>156</sup> Women's experience in today's society thus makes women's viewpoint the perspective of the victim. This viewpoint is not monolithic. Different women have different experiences and feelings.<sup>157</sup> But there are some shared elements: we are all judged by male standards, we are all subordinated to men, and our voices as women are forcibly silenced.<sup>158</sup> What women's perspective would be if we were not at the bottom of a male society is unknown.<sup>159</sup> MacKinnon argues:

[W]e have no idea what women as women would have to say. I'm evoking for women a role we have yet to make, in the name of a voice that, unsilenced, might say something that have never been heard. . . . In the legal world of win and lose, where success is measured by other people's failures, in this world of kicking or getting kicked, I want to say: there is another way.<sup>160</sup>

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155. This argument is inspired by, although not expressly made in, Scales, *supra* note 131.

156. How do you know when a group is on the bottom? It may be some indication when they can be assaulted, and authorities ignore them; physically abused, and people turn away or find it entertaining; economically deprived, and it is seen as all they are worth; made the object of jokes, and few ask what makes the jokes funny; imaged as animallike, confined to a narrow range of tasks and functions, and told it is all harmless or inevitable and even for their benefit as well as the best they can expect, given what they are. These are all true for women. In addition, we are excluded from inner circles and then rejected because we don't know the inside story; told we can't think and had our thoughts appropriated for the advancement of others; told the pedestal is real and called ungrateful and lacking in initiative when we call it a cage; and blamed for creating our conditions when we resist them. When a few of us overcome all this, we are told we show there are no barriers there and are used as examples to put other women down. She made it — why can't you? We are used as tokens while every problem we share is treated as a special case.

C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 30-31.

157. *Id.* at 76. ("[A]ll women are not the same. That's what *they* think — all women are the same.").

158. *See id.* at 75-76.

159. And men's perspective, as well, because male perspective is influenced as much by the fact that men are on "top" as female perspective is by the fact that women are on the "bottom."

160. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 77.

B. *The Silent Voice*

Carol Gilligan has created a feminist theory of women's moral and psychological perspective.<sup>161</sup> Although this theory has been criticized by some feminists as a dangerous glorification of women's victim perspective,<sup>162</sup> I believe it has validity and, if not used as a prescription for what women *should* be or as a validation of the way things *are*, it can help feminists "remake society so that women can live here. . . ."<sup>163</sup>

Gilligan's study began when she noticed "that women had been left out of . . . psychology research samples."<sup>164</sup> "Psychological theorists [had thus] fallen . . . into the same observational bias. Implicitly adopting the male life as the norm, they [had] tried to fashion women out of a masculine cloth."<sup>165</sup> Gilligan, therefore, began studying women's moral development and comparing it to existing psychological theory. This study led her to recognize that women's perspective differs from men's: women speak "in a different voice."<sup>166</sup>

Gilligan's observations about psychological theory support MacKinnon's idea that women's experience, as women live it, is suppressed in our male society and that society has, instead, defined women according to male standards.

[S]ince it is difficult to say "different" without saying "better" or "worse," since there is a tendency to construct a single scale of measurement, and since that scale has generally been derived from and standardized on the basis of men's interpretations of research data drawn predominately or exclusively from studies of males, psychologists "have tended to regard male behavior as the 'norm' and female behavior as some kind of deviation from that norm." Thus, when women do not conform to the standards of psychological expectation, the conclusion has generally been that something is wrong with the women.<sup>167</sup>

Gilligan, further, seems to agree with MacKinnon that women's different voice is a product, not of biology, but of society; that it is the voice of the victim. Gilligan argues that society not only defines the qualities of adulthood according to a male standard, but also discourages women

161. C. GILLIGAN, *supra* note 8.

162. See, e.g., 1984 James McCormick Mitchell Lecture, *supra* note 134, at 27-28 (Catherine MacKinnon speaking); Scales, *supra* note 131, at 1380-84 (arguing that Gilligan's work could become "the Uncle Tom's Cabin of our Century." *Id.* at 1381).

163. C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 16.

164. 1984 James McCormick Mitchell Lecture, *supra* note 134, at 39 (Carol Gilligan speaking).

165. C. GILLIGAN, *supra* note 8, at 6.

166. *Id.* at 1-4.

167. *Id.* at 14 (citation omitted) (quoting D.C. MCCLELLAND, *POWER: THE INNER EXPERIENCE* (1975)).

from pursuing those qualities in ourselves.<sup>168</sup> "[T]he very traits that traditionally have defined the 'goodness' of women, their care for and sensitivity to the needs of others, are those that mark them as deficient in moral development."<sup>169</sup> Society thus forces women to take the "different" and "worse" position. Unlike MacKinnon, however, Gilligan does not argue that women should change. She does not focus on how women can find out what our perspective would be if we were not victims. Rather, she argues that society should recognize the male definition of "adulthood . . . is itself out of balance."<sup>170</sup> By favoring the male perspective to the exclusion of the female view, society loses something very valuable: the female voice.

While I believe Gilligan's argument is valuable in remaking society so that women can live here now, others fear that it may sacrifice women's long-term success in becoming what we could be if we were not society's victims. For MacKinnon, for example, Gilligan's call for recognition of women's current perspective leaves unjustifiable male dominance in place, simply somewhat modified.<sup>171</sup> For Ann Scales, Gilligan's argument is in danger of becoming just another stereotype, another tool of male society used to keep women in our place.<sup>172</sup> While I agree with MacKinnon that Gilligan's theory does not attack the origins of the victimization of women, I believe that those origins are so deeply buried in societal history that seeking to change them from the roots is largely futile. Thus, although I believe MacKinnon's work in exposing those roots and their ugly results and in showing us that society could have grown differently (the way things are is not inevitable or natural), I believe Gilligan's thesis is a very productive means for changing society now. After all, we must begin our journey from where we are, not from where we might have been or from where we were many centuries ago. I also agree with Scales that Gilligan's description of a female voice carries real risks. For example, because the female voice is the result, not of nature, but of socialization, encouraging women to take this voice as our

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168. *Id.* at 17.

169. *Id.* at 18.

170. *Id.* at 17.

171. See 1984 James McCormick Mitchell Lecture, *supra* note 134, at 27-28 (Catherine MacKinnon speaking); C. MACKINNON, *FEMINISM UNMODIFIED*, *supra* note 7, at 38-39. Thus MacKinnon's argument against Gilligan's thesis is that it does not go far enough: it does not attack the root of the problem.

172. See Scales, *supra* note 131, at 1380-83. Scales believes that the male perspective is inherently unable to accept multiplicity. Male definitions are based on their lesser opposites and male definitions do not allow blending of opposites. Therefore, male society will never be able to recognize and accept the value of the female perspective. *Id.* at 1383. Thus, for Scales, the problem with Gilligan's argument is that it will not work and it will be used by male society as a weapon against women.

own carries the risk of forcing women into yet another artificial, unchosen life-definition. Also, characterizing the different perspective as "female" raises arguments that society should not accommodate it because that would entail privileging women over "other people." Such arguments rarely acknowledge that those "other people" are men, who have always been privileged over women. Gilligan's female voice also risks turning jobs where the elements of that perspective are particularly valuable into "women's work." Jobs that are so characterized tend to be filled primarily by women and these women receive lower pay and less respect for their work than do workers in related "men's" jobs.<sup>173</sup> Therefore, we must claim the credit for this voice, and we must be careful to characterize this perspective as an alternative and better perspective, rather than purely as a "female," (which, in today's society implies "inferior," "subjective," or "minority") perspective. We must insist that men as well as women take this perspective in all their endeavors. This will help women to create terms with which to express our lives and will help us to succeed personally and financially on our own terms. Used in this way, Gilligan's theory is useful as a first step toward remaking society.

Although what we should do with this information is thus in some doubt, Gilligan has, at least, given us some idea of women's current perspective.<sup>174</sup> She has also shown that the male perspective and the female perspective are not necessarily irreconcilable. This section will now discuss Gilligan's findings.

The most useful part of Gilligan's study for my purposes is her study of Amy and Jake. Amy and Jake are two eleven-year-old children in the same sixth-grade class. They were each asked to resolve a dilemma in which "a man named Heinz considers whether or not to steal a drug which he cannot afford to buy in order to save the life of his wife."<sup>175</sup> Heinz's dilemma evokes very different responses from the two children:

Jake . . . is clear from the outset that Heinz should steal the drug. Constructing the dilemma. . . as a conflict between the values of property and life, he discerns the logical priority of life and uses logic to justify his choice:

'For one thing, a human life is worth more than money, and if the druggist only makes \$1,000, he is still going to live, but if Heinz doesn't

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173. Examples of this phenomenon include the nursing profession (as opposed to the "medical" profession) and cooking (as opposed to being a "chef"). If alternative dispute resolution, for example, came to be characterized as a woman's profession, its practitioners might come to be lower-paid and less respected than "real" lawyers and "real" judges.

174. Note, however, that not *all* women share this perspective and that not *only* women use this voice.

175. C. GILLIGAN, *supra* note 8, at 25.

steal the drug, his wife is going to die. (*Why is life worth more than money?*) Because the druggist can get a thousand dollars later from rich people with cancer, but Heinz can't get his wife again. (*Why not?*) Because people are all different and so you couldn't get Heinz's wife again."

Asked whether Heinz should steal the drug if he does not love his wife, Jake replies that he should, say that not only is their "a difference between hating and killing," but also, if Heinz were caught, "the judge would probably think that it was the right thing to do." Asked about the fact that, in stealing, Heinz would be breaking the law, he says that "the laws have mistakes, and you can't go writing up a law for everything that you can imagine."<sup>176</sup>

In contrast, Amy's response to the dilemma conveys a very different impression. . . :

'Well, I don't think [Heinz should steal the drug]. I think that there might be other ways besides stealing it, like if he could borrow the money or make a loan or something, but he really shouldn't steal the drug — but his wife shouldn't die either.'

Asked why he should or should not steal the drug, she considers neither property nor law but rather the effect that theft could have on the relationship between Heinz and his wife:

'If he stole the drug, he might save the life of his wife then, but if he did, he might have to go to jail, and then his wife might get sicker again, and he couldn't get more of the drug, and it might not be good. So they should really just talk it out and find some other way to make the money.'

[S]ince Amy's moral judgment is grounded in the belief that, "if somebody has something that would keep somebody alive, then it's not right not to give it to them," she considers the problem in the dilemma to arise not from the druggist's assertion of rights but from his failure of response.<sup>177</sup>

From these and other responses, Gilligan surmises that the male voice expresses a "morality of rights,"<sup>178</sup> while the female voice expresses an "ethic of care."<sup>179</sup> The male perspective sees moral dilemmas as presenting problems of logic, law, and rights. The male perspective treats such dilemmas in an abstract, impersonal, objective manner. The male voice solves the problem by applying a hierarchy of rights.<sup>180</sup> This perspective

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176. *Id.* at 26.

177. *Id.* at 27-28.

178. *Id.* at 164.

179. *Id.* at 30.

180. *Id.* at 26-63.

allows Jake to solve Heinz's dilemma like "a math problem with humans"<sup>181</sup> and reach a certain, final decision with which he is confident a judge would agree.<sup>182</sup>

The female perspective, however, sees Heinz's dilemma as "a narrative of relationships that extends over time."<sup>183</sup> The female voice questions the question: Amy wants more facts and questions her position as decisionmaker. The female perspective sees the people in hypothetical moral dilemmas as real and as connected, rather than as imaginary, atomistic individuals. The female voice seeks to maintain the connection, rather than to choose between the individuals.<sup>184</sup> The female perspective sees the solution in using communication to activate the network of relationships that connects the people, rather than in applying a hierarchy of abstract principles. This perspective leads Amy to put her faith in the people themselves to resolve the dilemma. She is as certain that they will live up to her expectations as Jake is that a judge would agree with his logic.<sup>185</sup> Amy is, however, less certain of the final solution, because she tries to keep everyone's interest in mind - those of Heinz, the druggist, and the wife - and because she sees a variety of possible solutions rather than just the single choice.

The differences in these two perspectives become clear as they are played out in many aspects of life and thought. For example, people who take the male perspective define themselves through the separation from others and measure themselves against an abstract ideal of perfection, while people who take the female perspective define themselves through connection and measure themselves according to their particular activities of care.<sup>186</sup> The male perspective takes responsibility to the self for granted and understands responsibility to others to entail limiting interference with those others.<sup>187</sup> For the female perspective, on the other hand, "responsibility signifies response, an extension rather than a limitation of action. Thus it connotes an act of care rather than the restraint of aggression."<sup>188</sup> The female perspective also tends to put others before the self in determining to whom responsibility is owed.<sup>189</sup> The male perspective "depict[s] a world of dangerous confrontation and explosive connection, where [the female perspective] sees a world of care and protec-

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181. *Id.* at 28.

182. *Id.* at 26 and 29.

183. *Id.* at 28.

184. *Id.* at 28-63.

185. *Id.* at 29.

186. *Id.* at 35.

187. *Id.* at 37-38.

188. *Id.* at 38.

189. *Id.* at 39

tion, a life lived with others whom 'you may love as much or even more than you love yourself.'"<sup>190</sup> These differing views of the world led men in Gilligan's study to see violence in situations of personal affiliation and led women to see violence in impersonal situations of achievement and competition.<sup>191</sup>

While society recognizes, validates, and encourages the male voice, it discounts and silences the female one. The interviewer's reaction to Amy's response to Heinz's dilemma illustrates how this silencing works. "[A]s the interviewer conveys through the repetition of questions that the answers she gave were not heard or not right, Amy's confidence begins to diminish and her replies become more constrained and unsure."<sup>192</sup> "[W]hile [Jake's] assumptions about [the impossibility of] agreement are confirmed by the convergence in logic between his answers and the questions posed, [Amy's] assumptions are belied by the failure of communication, the interviewer's inability to understand her response."<sup>193</sup> As they grow up, people who speak in the female voice learn to adopt the male voice in order to satisfy society's expectations. By age fifteen, Amy still feels the same way about Heinz's dilemma: "The whole situation is unreal."<sup>194</sup> But she is beginning to play society's game. She finishes her response by adopting Jake's answer because she now knows that Jake's answer, despite the tension and uncertainty it creates in her, is the "right" answer in society; only Jake's answer will gain societal approval.<sup>195</sup> By age nineteen, women like Amy "have developed an acute tendency toward self-doubt and self-questioning. There was a kind of hesitation among [these] women, and even a kind of disbelief in their own ability to talk about reality . . . . [They tended to ask]: 'Would you like to know what I think, or would you like to know what I *really* think?' . . . [They] had learned to 'think' in a way that was very different from the way that [they] 'really thought.'"<sup>196</sup> Society, by accepting the male voice, forces the female voice into tense silence. "As we have listened for centuries to the voices of men and the theories of development that their experience informs, so we have come more recently to notice not only the silence of women but the difficulty in hearing what they say when they speak."<sup>197</sup>

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190. *Id.* at 38.

191. *Id.* at 39-45.

192. *Id.* at 28-29.

193. *Id.* at 29.

194. 1984 James McCormick Mitchell Lecture, *supra* note 134, at 41 (Carol Gilligan speaking).

195. *Id.*

196. *Id.* at 40.

197. C. GILLIGAN, *supra* note 8, at 173.



Gilligan's study shows that legal education and practice also further this process of silencing the female voice. Hilary, a lawyer who participated in Gilligan's study, faced the silencing effect of legal practice when opposing counsel in a trial overlooked a document critical to his client's case.<sup>198</sup> In deciding she could not tell her opponent about the document, "Hilary realized that the adversary system of justice impedes not only 'the supposed search for truth' but also the expression of concern for the person on the other side."<sup>199</sup> "[T]he concept of rights [is] in tension with an ethic of care"<sup>200</sup> and the adversary system forces Hilary to speak in terms of the morality of rights and to suppress her own voice of care. "The adversarial system can not easily accommodate two perspectives which are in fundamental tension with each other. There is a wish to resolve or reduce ambiguity, to arrive a certainty, and that is done by eliminating one perspective or the other."<sup>201</sup>

Gilligan argues that this silencing of the female voice is harmful, not only to the people who experience it, but also to society as a whole. According to Gilligan, the exclusivity of the male perspective harms both men and women, because "[m]ost people use both voices."<sup>202</sup> It also harms society because, by excluding the female voice, the male perspective limits its focus. It defines its problems too narrowly. It limits the types of processes available to solve those problems. And it limits the available solutions to those problems. The male perspective thus asks the wrong questions and suggests incomplete and uncreative solutions. "[I]n the different voice of women lies the truth of an ethic of care, the tie between relationship and responsibility, and the origins of aggression in the failure of connection."<sup>203</sup>

Gilligan, therefore, seeks an inclusive society, which will change the way society approaches its problems. Gilligan gives us an example of an inclusive solution to the tension between the male and female perspectives:

[T]wo four-year-olds . . . were playing together and wanted to play different games. The girl said: "Let's play next-door-neighbors." The boy said: "I want to play pirates." "Okay," said the girl, "then you can be the pirate who lives next door." She has reached . . . *an inclusive solution* rather than a *fair solution* — the fair solution would be to take turns and play each game for an equal period . . . Each child would

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198. *Id.* at 135.

199. *Id.*

200. *Id.* at 136.

201. 1984 James McCormick Mitchell Lecture, *supra* note 134, at 48 (Carol Gilligan speaking).

202. *Id.* at 47.

203. C. GILLIGAN, *supra* note 8, at 173.

enter the other's imaginative world. The girl would learn about the world of pirates and the boy would learn about the world of neighbors . . . . But . . . neither game would change — the pirate game would stay the pirate game, and the neighbor game would stay the neighbor game . . . .

Now look what happens in . . . *the inclusive solution*. By bringing a pirate into the neighborhood, both the pirate game and the neighbor game change. In addition, the pirate neighbor game, the combined game, is a game that *neither* child had separately imagined. In other words, a new game arises through the relationship.<sup>204</sup>

The two children create the new game together, create the rules of play together, and explore the possible resolutions together. This inclusive approach allows greater creativity in society and keeps the one voice from overwhelming and silencing the other. It allows society to meet the needs of both perspectives without compromising.<sup>205</sup>

## V. THE FEMINIST CRITIQUE OF ALTERNATIVE DISPUTE RESOLUTION

Feminist jurisprudence has important implications both for adjudication and for the alternative dispute resolution movement. Feminist theory's criticisms of objectivity, adverseness, abstract rights, and hierarchy as males suggest that the legal system as it currently works offers little hope to women. The conflict resolution methods offered by the alternative dispute resolution movement, on the other hand, offer a great deal of hope. Unfortunately, the movement has adopted many of the elements of the adversary system that feminist theory has criticized. Now feminists' hope lies in reversing this trend.

### A. *Negotiation*

Negotiation offers a great deal to feminists who want to inject a female perspective into the process of dispute resolution. Negotiation has the potential to remove disputes from the rigid hierarchy of the courts, to limit adverseness and competition, to contextualize rather than abstract disputants' interests, and to avoid male objectivity by allowing female voices to be heard. This potential can improve both the process and the results of conflict resolution by encouraging direct dialogue between voices and by facilitating inclusive solutions to problems.

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204. 1984 James McCormick Mitchell Lecture, *supra* note 134, at 45 (Carol Gilligan speaking).

205. *Id.* at 54.

1. *The Competitive Approach.* As applied under the competitive approach, negotiation fails to achieve its potential. The competitive approach assumes the disputing parties are competing over the same limited and equally valued items and, therefore, that success is measured by maximum individual gain.<sup>206</sup> The parties to a competitive negotiation battle their way along a linear field until either they both compromise somewhere between their original positions or until one wins and the other concedes defeat. The battle is conducted largely through tactics of manipulation, intimidation, and deceit.

This process completely excludes the concerns of the female voice. Adversarial battling is inherently inconsistent with the ethic of care. It excludes the relationship between the parties, a central concern of the female perspective, from consideration. By measuring success in terms of beating the other, adversarial battling discourages either side from seeking to meet the needs of the other. The tactics recommended for this battle discourage the process of open communication on which the female perspective and feminism, in its emphasis on consciousness-raising, relies in seeking truth. By emphasizing competition, competitive negotiation stifles communication and encourages argument. The competitive approach may also discourage participation by the actual parties to the conflict, thus defeating the female perspective's goal of inclusion of varying perspectives.

The female perspective also challenges the assumptions of the competitive approach to negotiation. The female perspective fights the assumption that different people want the same things and value those things equally and exclusively. The female perspective insists that this assumption be proved.<sup>207</sup>

The female perspective challenges the limitations the competitive approach places on solutions to disputes. By encouraging position-taking and solutions lying along a linear field between the positions, the competitive approach discourages exploration of creative, inclusive solutions<sup>208</sup> that seek to satisfy all the parties' interests, even those interests which do not fit within traditional assumptions about value. The female perspective does not easily accept narrowing or exclusive constructions of problems. It looks beyond the straight-line, traditional, positioning approach to problems in its search for truth.

The female perspective also challenges the emphasis on winning that characterizes the competitive approach. The female perspective focuses on meeting the parties' needs rather than on winning and losing and on

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206. Menkel-Meadow, *Portia in a Different Voice*, *supra* note 154, at 51.

207. See *supra* text accompanying notes 183-85.

208. Carol Gilligan's "pirate-neighbor" game is one such creative, inclusive solution.

maintaining good relationships rather than on parties "beating" each other.

The competitive approach thus conflicts with the female perspective. In addition, the competitive approach contributes to the silencing of women's voices, as women, in the practice of law. Some evidence suggests that women bargain less competitively than men do.<sup>209</sup> Women's more accommodating approach may make women less successful, less likely to "win," at competitive negotiation than men. Thus, the competitive approach not only threatens the female voice in society but also threatens to silence individual women's voices in the practice of law.

2. *The Cooperative Approach.* The cooperative approach to negotiation leaves a great deal more room for the female perspective than does the competitive approach. The cooperative approach thus comes much closer to achieving its potential than does the competitive approach. It does, however, have some serious limitations.

The cooperative approach focuses on communication rather than competition, and therefore poses less threat to the relationships between the parties and between the negotiators. The cooperative approach is consistent with the female perspective's emphasis on direct, open communication and relationships. The cooperative approach may also encourage greater participation by the actual parties to the dispute, thus furthering the female perspective's goal of inclusion.

The cooperative approach, by focusing on creating value, refuses to assume that the parties value the same things equally and exclusively. It allows negotiators to seek the parties' real interests by looking beyond traditional assumptions about value. The cooperative approach is thus consistent with the female perspective's insistence on considering context rather than abstract general assumptions. This broad focus also more easily allows women's experience, as it is reflected in our valuation, to be taken into account, even when it does not fit within abstract, traditional "reality." The cooperative approach's broad, nonlinear approach also encourages creative, inclusive solutions that meet the parties' real needs.

Further, the cooperative approach may enable women to speak in our own voices, both in society, by giving women a forum for our own expression of our own experience, and in legal practice, by adding to our personal sense of success in that practice. The cooperative approach may thus help feminism transform the legal profession.

However, the cooperative approach is limited, from the feminist perspective, by its insistence on using objective criteria. As Catherine

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209. See J. RUBIN & B. BROWN, *THE SOCIAL PSYCHOLOGY OF BARGAINING AND NEGOTIATION* 171 (1975).

MacKinnon's analysis suggests, the objective stance is the male perspective. Objective criteria, such as the law, have been defined by men according to male experience. They, therefore, often favor men and exclude the experience of women. Such criteria force women to live, and to negotiate, according to standards we had no part in creating or interpreting. Thus, although such objective criteria are useful, they must be carefully examined and, whenever necessary, modified to take women's experience into account or discarded.

The cooperative approach is further limited by its vulnerability to abuse by competitive bargainers. The male perspective has traditionally seen the female perspective as weak and irrelevant and has increased its attempts to smother that perspective. Similarly, competitive bargainers may treat the cooperative approach as a sign of weakness and increase their manipulative tactics accordingly. Competitive bargainers may not recognize that the cooperative approach has something valuable to offer them, just as many men have failed to recognize that feminism can help men as well as women. When faced with such competitive tactics, the cooperative negotiator must either forsake the cooperative approach and battle the competitive negotiator on her own field, continue the cooperative approach and take the very real risk of "losing" to the competitor, or quit. This choice is similar to the choice women face as lawyers: to live according to the male standards for successful lawyering, and thus sacrifice our personal voices, or to live according to our own standards, and thus sacrifice our professional careers. This problem is also reflected in Jake and Amy's negotiating relationship. "If Jake chooses not to listen to Amy, he can win . . . If you have power, you can opt not to listen. And you do so with impunity."<sup>210</sup> "If their negotiation doesn't work, they'll have to then go back within the larger system — and in that case Jake's voice will prevail."<sup>211</sup> The cooperative approach lacks the societal power and support that the competitive approach receives. This puts the cooperative approach at a serious disadvantage. The cooperative approach, like the female voice, needs more societal support in order to transform the negotiation process and the legal system.

### B. *Mediation*

Mediation also offers a great deal of hope to feminists. The mediator has the ability to promote cooperative negotiation between the disputing

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210. 1984 James McCormick Mitchell Lecture, *supra* note 134, at 62 (Carol Gilligan speaking).

211. *Id.* (Carrie Menkel-Meadow speaking).

parties. As explained above, cooperative negotiation helps make room in the legal system for the female voice. The mediator, therefore, can ensure, even more than cooperative negotiation alone, that negotiation encourages maintaining relationships, open communication, party inclusion, creative and inclusive solutions, and women's expression of women's experience. Mediation can thus inject the female voice into the process of negotiation.

Mediation can also potentially improve the substantive results of negotiation for women. As I noted above,<sup>212</sup> there has been some debate over whether the mediator should take any responsibility for the fairness of the negotiated result to the parties, to third parties, or to the community. This additional responsibility would require the mediator to watch for, and remedy, inequalities of bargaining power throughout the negotiation process. If this function were taken seriously, it would require the mediator to occasionally take sides in the negotiation and to occasionally refuse to accept a solution to which all parties agree. This added function could thus keep social inequalities of power from adversely affecting the results of mediation for women.<sup>213</sup>

This additional fairness-ensuring function would give the mediator greater power to ensure that cooperative bargaining is not overpowered by competitive bargaining. Because vulnerability to competition is a serious impediment to the success of cooperative negotiation, this additional function of mediation could be a major improvement. The function can make mediation a more effective feminist tool by giving the cooperative approach, and the female voice, the societal support it needs in order to truly transform the process of dispute resolution. The substantive function may increase Amy's power by forcing Jake to listen to the female voice. It may thus ensure that women have the opportunity to express women's experience in our own terms and to have that experience and those terms recognized. It may help competitive bargainers see that the cooperative approach has value, and it may help more men see that the female perspective has value. Moreover, the function may keep society and the legal profession from forcing women to choose between voices. Finally, by looking beyond the immediate parties, this function furthers Amy's desire to take all interests (including Heinz's wife's interests, the interests of society, and the interests of the future) into account.

This additional function can, however, inject increased hierarchy and objectivity into the negotiation between the parties. The more involved the third party mediator becomes, the more power she has, and the more

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212. See *supra* text accompanying notes 104-07.

213. See *supra* notes 104-07 and accompanying text.

objectivity and hierarchy enter the relationship between the parties. This function does, therefore, have drawbacks. The increased participation of the female perspective, however, seems to outweigh these possible drawbacks. In addition, the problems of hierarchy and objectivity can be limited by mediators themselves. For example, a trained mediator may be able to keep her mind open to women's subjective experience as well as to male subjective experience, thereby limiting the exclusive maleness of the objective stance. Similarly, such a mediator may be able to downplay and limit the detrimental effects of hierarchy by encouraging the parties to speak for themselves in a contextual discourse. At any rate, the hierarchy and objectivity in mediation is much less than in adjudication, simply because rigid adherence to legal rights, rules, and precedents is largely unhelpful to the mediator.<sup>214</sup>

### C. Arbitration

Because arbitration, as it is currently practiced,<sup>215</sup> is merely a private form of adjudication, it raises many of the same concerns for feminist theory as judicial adjudication. Current arbitration involves adverseness, objectivity, hierarchy, and abstraction much as judicial adjudication does. It thus suppresses the female voice and conflicts with the central principles of feminist theory by imposing male perspectives, standards, and processes and by ignoring context and relationships. Arbitration also limits parties' abilities to explore creative, inclusive, non-traditional solutions to disputes by focusing on linear positioning and argument and on limited, win/lose results. Finally, it encourages the participation of lawyers and decreases the parties' ability to communicate directly and openly with each other.<sup>216</sup>

Arbitration would more successfully serve feminist goals if it were practiced under the mediatory approach.<sup>217</sup> This approach requires the arbitrator to act primarily as a mediator and more rarely as a judge. Arbitration under this approach would serve many of the feminist purposes that mediation serves. The mediator/arbitrator would foster communication among the parties, work to maintain and strengthen the rela-

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214. See Rifkin, *supra* note 12, at 27.

215. See *supra* text accompanying notes 114-16.

216. The parties or their attorneys do, of course, communicate with the arbitrator. This type of communication, however, is not what the female voice means by "communication." The female perspective relies on direct, open discourse between the parties (Heinz and the druggist), rather than limited, persuasive, hierarchical argument directed at some higher body, as its central process.

217. See *supra* text accompanying notes 117-18.

tionship between the parties, encourage the expression of alternative voices, and encourage creative, inclusive, nonbipolar solutions. The mediator/arbitrator could also take on the fairness-ensuring function that may or may not be accepted as a mediation function.

However, the problems of objectivity and hierarchy that arise in mediation are even more problematic in the context of the mediatory approach to arbitration. It is much harder to downplay the obvious hierarchical power of the arbitrator, because she ultimately makes the final, official decision. It is also much harder to limit the effects of male-defined objectivity in this context because the arbitrator's decision will very likely be subject to judicial review or enforcement. This judicial supervisory system is heavily indoctrined in objectivity and will likely insist that the arbitrator take an objective stance.

Arbitration as it is currently practiced under the adjudicatory approach is, therefore, a slight improvement on judicial adjudication, if only because it can avoid some of the male-dominated rules of court process. Arbitration under the mediatory approach is potentially a great improvement over judicial adjudication, but is not as effective, from a feminist standpoint, as mediation can be because of the increased effects of objectivity and hierarchy.

#### VI. ALTERNATIVE DISPUTE RESOLUTION IN A FEMINIST VOICE — SUGGESTIONS

Perfection of alternative dispute resolution must begin in the law school classroom. First, of course, the law school curriculum must include alternative dispute resolution courses. The involvement of law professors in studying alternative dispute resolution will help the movement focus itself, examine itself, and work systematically to correct its flaws. The involvement of law professors in teaching alternative dispute resolution methods and theories to students will improve the practice of alternative dispute resolution in the legal profession.

Feminist jurisprudential theory had focused on legal education as a central tool for improving the practice of law in general. Just as feminist jurisprudential theory should be an aspect of all legal education, feminist jurisprudence should play an important part in the teaching of alternative dispute resolution. Because alternative dispute resolution challenges traditional legal pedagogy, it should not be difficult to include the feminist pedagogical challenge in alternative dispute resolution courses.

Several methods exist for teaching alternative dispute resolution: for example, the traditional law school lecture/discussion approach, the sim-



ulation approach,<sup>218</sup> and the process observation approach.<sup>219</sup> It seems the best approach involves a combination of these three methods. The lecture/discussion format provides theoretical and basic procedural insights. The simulation approach gives students the opportunity to assess their own reactions to alternative resolution situations and gives them a taste of legal practice. Finally, the process observation approach lets students see alternatives in action, see the effects of alternative dispute resolution methods on the parties, assess practice in the light of theory, assess theory in the light of practice, and recognize their own assumptions about legal process and alternatives.

What is important for the purposes of this Article, however, is the necessity to integrate feminism into all aspects of the alternative dispute resolution course. Alternative courses, like legal education, seem to focus on abstract rules and methods and fixed-fact simulation exercises. These elements of alternative dispute resolution courses encourage competition because they lower the apparent stakes of alternative dispute resolution processes; they take the parties out of their multi-faceted real lives and simplify conflict resolution into a zero-sum game. Simulations are particularly guilty of this because it is so difficult for a professor to manage and to grade a nonzero-sum or multi-faceted exercise. Creative processes and results are difficult to measure on the standard grading curve. Therefore, simulation exercises force students to wear blinders against reality and to battle with their classmates for artificially scarce points.

The usual approach to alternative dispute resolution teaching encourages, even demands, the male perspective. Context, a central element of the female perspective, is limited in order to facilitate grading. Points must be made artificially scarce in order to fit grades onto the proper curve. Evaluation must be objective in order to prevent bias. The combination of abstraction, scarcity of resources, and objectivity is deadly to the female voice. The effects of this combination on students ensures that the female voice will remain silent even after the class ends. By encouraging competition and discouraging creativity, this combination reinforces the male perspective students learn in their traditional courses and makes alternative dispute resolution less meaningful as an alternative to adjudication.<sup>220</sup>

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218. See, e.g., Green, *A Comprehensive Approach to the Theory and Practice of Dispute Resolution*, 34 J. LEGAL EDUC. 249 (1984).

219. See Bush, *Using Process Observation to Teach Alternative Dispute Resolution: Alternatives to Simulation*, 37 J. LEGAL EDUC. 46 (1987). This approach requires students to observe several actual alternative dispute resolution sessions and then discuss their observations in class.

220. See Hegland, *Moral Dilemmas in Teaching Trial Advocacy*, 32 J. LEGAL EDUC. 69 (1982) (discussing the effects of such simulations in trial advocacy courses).

How, then, can alternative courses make alternative dispute resolution a more meaningful alternative? By changing the game. The lecture/discussion aspect of an alternative dispute resolution course should emphasize the practical and theoretical benefits (both under traditional arguments and under feminist theory) of the more productive (socially and economically) alternative dispute resolution methods: cooperative negotiation, mediation with a substantive fairness element, and the mediatory approach to arbitration. Further, the lecture/discussion part of the course should expressly deal with Jake and Amy's story, should encourage both voices to participate in discussion, and should encourage students to try using both voices. This discussion will legitimate both voices. This will also allow exploration of how Amy's voice and Jake's voice interact.<sup>221</sup> The lecture should also focus explicitly on the failures of the adjudicatory system, and particularly on the limits of our assumptions about scarcity of resources and the necessity of adversarial behavior.

The simulations in an alternative dispute resolution course should be fewer in number and greater in complexity. Professors should go out on a limb: encourage creativity, cooperation, complexity, context, inclusion, and expression in simulation exercises.<sup>222</sup> Students have already learned adverseness. They need practice in reality. Further, professors should have students explain the benefits of their chosen processes and results. This allows students to integrate theory and practice. This may make grading, not only more challenging, but also more interesting.

The process observation approach<sup>223</sup> should be part of alternative dispute resolution courses. This approach allows students to see the possibilities and the realities of alternative dispute resolution. It exposes students' assumptions about dispute resolution processes and subjects them to critical analysis. It encourages students to examine the many interests at stake and the many possible solutions. The process observation approach also exposes students to the variety of dispute resolution methods in action and allows concrete examination and comparison.<sup>224</sup>

The broad process observation approach has several benefits. It makes room in the law school curriculum, and in alternative dispute resolution processes, for the female voice. It helps create lawyers who can look be-

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221. See Spiegelman, *Integrating Doctrine, Theory and Practice in the Law School Curriculum: The Logic of Jake's Ladder in the Context of Amy's Web*, 38 J. LEGAL EDUC. 243, 252-55 (1988).

222. *Id.* at 250-52 (explaining how these attributes are useful in legal education generally). See also *id.* at 257-60 (discussing the value of experiential learning to legal education).

223. See Bush, *supra* note 219.

224. *Id.*

yond narrow objectivity and abstraction in their search for fuller versions of truth and justice. Furthermore, it helps make alternative dispute resolution a real and useful alternative to judicial adjudication.

## VII. CONCLUSION

This Article has explored the theory, goals, and methods of the alternative dispute resolution processes of negotiation, mediation, and arbitration. It has shown how these alternative dispute resolution processes in practice fail to live up to their own goals. Further, it has explored the theory and goals of feminist jurisprudence. The Article explored how alternative dispute resolution has failed to achieve its potential in feminist terms. Finally, it has explored how these failures can be corrected in legal education.

I believe that alternative dispute resolution has tremendous potential as a means for improving dispute resolution and as a means for giving women, as disputants and as lawyers, the freedom necessary to explore our own voices, however we may speak. Alternative dispute resolution has the potential to help make room in the world for women's experience, and thus to help transform both the world and women's experience. It will, however, take concerted effort on the parts of legal scholars, professors, students, and practitioners to make alternative dispute resolution achieve its potential.

